

ISLAMABAD LAW REVIEW

Vol: II Nos. 1&2
Spring & Summer 2018

Special Issue on Islamization of Laws in Pakistan



*Published as part of the project
Legal Education Support Program in Pakistan
in collaboration with Sandra Day O'Connor College of Law
Arizona State University, Phoenix, AZ*

A Journal of the Faculty of Shariah and Law
International Islamic University, Islamabad

Why the Dream of Islamization could not be Realized? An Appraisal of the Role of FSC and CII

TAJ MUHAMMAD*

Abstract:

Pakistan isan Islamic Republic and Islam is the state religion of this country. In this regard, the article 227 of the constitution, on the one hand, obliges the state to make all the existing laws of the state compatible with Islamic injunctions and, one the other hand, it prohibits to enact any law repugnant to these injunctions. In order to fulfill this obligation two important institutions have been established under the constitution i.e. the Federal Shariat Court (FSC) and the Council of Islamic Ideology (CII) under article 203 and 228 of the constitution respectively. The former is a court which has power to nullify any law on the ground of being repugnant to Islamic injunctions. The latter provides recommendations to the Parliament about Islamization of laws. Despite having these institutions, the aspirations of the Pakistani nation to be governed completely by the Shari'ah of Islam could not become legal reality. This is primarily because the role of FSC and CII had not been effective in this regard. There are various factors which played their role in making these institutions less effective. This situation calls for a thorough study of why these institutions could not deliver what was expected from them and how these institutions can become more efficient in their functions. This paper is an attempt to analyze the role of FSC and CII and explore the reasons why these institutions could not succeed efficiently. The paper also gives recommendations to bring improvements in these institutions so that the dream of Islamization of laws can be realized according to the aspirations of the Pakistani nation.

Keywords: FSC, CII, Islamization of Laws, Constitution of Pakistan

1. Introduction:

Pakistan is by constitution an Islamic Republic which recognizes Islam as state religion and aspires not only to make laws that are compatible with Islamic injunctions but also to bring all the existing laws in conformity with the injunctions of Islam as enunciated in the *Qur'an* and the *Sunnah* of the Holy Prophet peace and blessings be upon him.¹ In order to translate these aspirations into reality, Pakistan has a system of Islamization of laws which works in two folds. First, there is Council of Islamic Ideology (hereinafter CII) which has been entrusted with the power to look at the existing laws of Pakistan in the perspective of their Islamicity. The council evaluates the laws, enforced for the

* The author is PhD (Law) scholar in the Department of Law, Faculty of Sharia and Law, International Islamic University Islamabad. The author can be reached at tajsazini@gmail.com.

¹Constitution of the Islamic Republic of Pakistan, 1973, article 227

time being, to check their conformity with the Islamic injunctions and suggests amendments if there is any repugnancy of the laws with the teachings of *Shari'ah*. Apart from that, the CII gives its opinion to the parliament for the laws that are going to be enacted. The opinions of the CII are, however, not binding on the parliament. Secondly, the Federal Shariat Court (hereinafter FSC) has the jurisdiction to check the Islamicity of existing laws. The FSC has the power to declare any law null and void up to the extent of the repugnancy of the law with the injunctions of *Shari'ah*. The government of Pakistan has the option to challenge the FSC's decision in the Shariat Appellate Bench (hereinafter SAB) of the Supreme Court of Pakistan (hereinafter SCP). Despite the fact the Pakistan has institutions for, and a system of, Islamization, the dream of Islamization of Pakistani laws could not be realized. In the following an attempt is made to analyze the factors which make the CII and FSC inefficient in their constitutional roles and thus the process of Islamization is not able to go at the required pace. The analysis would be followed by the conclusions and at the end suitable recommendations would be given to cure the discrepancies.

2. Islamization as an Obligation under *Shari'ah*

Before getting into the discussion of the constitutional scheme of Islamization in Pakistan and institution for that purpose, it is of significance to prove that the very Islamization is required by injunctions of Islam and *Qur'an* and *Sunnah* demand from Muslims to make laws that are compatible with them. As far as *Qur'an* is concerned, there are a number of verses which show that it is obligatory on Muslims to dispose of their disputes according to the laws revealed by Allah Almighty. Since citation of all the relevant verses from the *Qur'an* is beyond the scope of this paper, only three verses from *Qur'an* are cited here. In the *Sūrah al-Mā'idah*, Allah says:

"Therefore, [O children of Israel,] hold not men in awe, but stand in awe of Me; and do not barter away My messages for a trifling gain: for they who do not judge in accordance with what God has bestowed from on high are, indeed, deniers of the truth!² And they who do not judge in accordance with what God has revealed –they, they are the

²*Qur'an* 5:44. The translation of the *Qur'anic* verses in this work is, unless indicated otherwise, taken from the translation of Muhammad Asad. See, Muhammad Asad, *The Message of the Qur'an*, (London: The Book Foundation, 2008)

evildoers!³ Let, then, the followers of the Gospel judge in accordance with what God has revealed therein: for they who do not judge in the light of what God has bestowed from on high – it is they, they who are truly iniquitous!"⁴

Syed Abul A'lā Mawdūdī in his interpretation of these verses says that in these verses Allah Almighty has provided three rules for the people who do not judge in accordance with what has been revealed by Allah. First, these people are *kāfirūn* i.e. infidels, second, these people are *zālimūn* i.e. iniquitous and third, they are *fāsiqūn* i.e. evildoers. It is clear from these words that any person who ignores Allah's laws and judges according to man-made laws, he commits three big offences. First, this act of the person amounts to denial of the command of Allah which is *kufr*. Secondly, this act is against the justice because the ultimate justice lies in the command of Allah and therefore, whatever is decided other than His command is injustice. Thirdly, in spite of being His servant, when he deviates from the command of his master he crosses the boundary of submission and that is *fiṣq*. Mawdūdī further specifies each group of people to whom one of these rule could be attributed. He says the people who do not believe in what was sent down to us by Allah Almighty fall in the category of people who are *kāfirūn*. The persons, who believe in the revelation and Allah's laws but they do not implement that law in their lives; instead they apply the man-made laws, is declared to be *zālimūn*. This is because the ultimate justice is what has been given by Allah and leaving His laws aside and adopting laws made by human being is therefore injustice and evildoing.⁵ Mufti Muhammad Shari' also concludes the same that deciding matters contrary to the injunctions of Allah is in some instance *kufr* when the person does not believe these injunctions to be right while in other situations it is *zulm* and *fiṣq* to do so when the person believes the injunctions Allah to be the right but he fails to act accordingly.⁶

One can claim, looking at the apparent words of these verses that these verses are about the *bani Israel* who are Jews and Christians as this has been held by a number of scholars of *Qur'ān*

³Qur'ān 5:45

⁴Qur'ān 5:47

⁵ See, Syed Abul A'lā Mawdūdī, *Tafhīmūl Qur'ān*, (Lahore: Idārah Tarjumānūl Qur'ā, n.d.) 1:475-76

⁶ See, Mufti Muhammad Shafi', *Ma'āriful Qur'ān*, (Karachi: Maktaba Ma'āriful Qur'ān, 2008), 3:165

including Abdullah b. al-'Abbās⁷ in one of his opinions. But the majority of Muslim scholars are of the opinion that these verses are as applicable to Muslims as these are for the people of book. It is narrated that one a person said in front of Huzayfah b. al-Yamān that these verses are about the children of *Israel*. Huzayfah abruptly replied that:

"What the good brothers of yours are *banū Israel!*
Whatever is bitter that is for them and whatever is
sweet that is for you? No! By Allah, you will have
to follow their path step by step."⁸

These verses from the *Qr'ān* and their interpretation prove that Muslim states are under obligation to make their laws in accordance with the teachings of Islam. The same obligation has not only been recognized by Pakistan in the objective resolution and constitutional provisions, but also efforts have been made to fulfill this obligation. The FSC and CII are the two institutions that are entrusted to work for this cause.

3. Role of the Institutions for Islamization in Pakistan

For the purpose of this study, two constitutional institutions are being taken into consideration i.e. the Council of Islamic Ideology and the Federal Shariat Court. In the following, a brief introduction of these institutions followed by the reasons of their unsatisfactory performances is given.

3.1. Council of Islamic Ideology

The idea of an institution to look at the laws in the perspective of injunctions of Islam was first proposed –as Islamic Commission– by the Constitution of Pakistan, 1956. Article 198 of the said constitution made the president of Pakistan under obligation to establish the commission within one year so that the laws that were enforced in Pakistan could be brought in conformity with Islamic injunctions and the commission would give recommendations to the provincial assembly and national

⁷ See, Abu 'l-Tayyib Muhammad Siddiq Khān b. Hassan al-Qinnūjī, *Fath al-Bayān fī Maqāsid al-Qur'ān*, (Beirut: Al-Maktabah al 'Asriyyah Li 'l-Tabā'ah Wa 'l-Nashr, 1992), 3:428. However, in another opinion of Ibn 'Abbās he has been quoted to have said that "What a great nation you are! If there is something sweet that is for you and if something is bitter that is for the people of book." This means he also opined that these verses are for Muslims too. See, Abdurrahmān b. Abī Bakr Jalāl al-Dīn al-Suyūti, *Al-Durr al-Manthūr fī 'l-Tafsīr bil-Ma'thūr*, (Beirut: Darul Fikr, n. d.) 3:88.

⁸ The saying of Huzayfa reads: " نعم الأخوة لكم بنو إسرائيل إن كان لكم كل حلوة ولهم كل مرة كلاً والله " .التسلكن طريقهم قدر الشراك . See, Al-Suyūti, *Al-Durr al-Manthūr*, 3:88.

assembly to give the injunctions of Islam the legislative effects.⁹ The constitution of 1956, however, was abrogated before the commission could be established in accordance with the article 198 of the same.

The institution was finally established in 1962 –as “Advisory Council of Islamic Ideology”.¹⁰ The articles 199-206 of the Constitution of Pakistan, 1962 dealt with the establishment, composition, membership duration and functions of the council. The council was entrusted to check Islamicity of existing laws and provide opinion about conformity of any proposed law with the principles of Islamic Sharia.¹¹

The Advisory Council of Islamic Ideology was renamed as Council of Islamic Ideology CII after the constitution of 1973. The part 9, articles 228-231, of the 1973’s constitution deal with the composition, functions and tenure of the membership, rules of procedure of the council. The provisions about the council of the constitution of 1962 and 1973 are quite similar with two major differences. First, the number of membership was not less than five and not more than 12 in the 1962’s constitution while this number is between 8-20 under the 1973’s constitution. The second major difference is about the representation of women and sects.¹² According to the 1973’s constitution the members should be from different sects and there must be at least one woman member. In the 1962’s constitution the president had to regard the appreciation of the person to the teachings of Islam and his understanding of the principles of Islam and legal, political, administrative and economic problems of Pakistan.¹³

This was a brief introduction and historical background of the CII. The rest about the CII shall be discussed later.

3.2. Federal Shariat Court

The Federal Shariat Court (FSC) was established in 1980 by a Presidential order¹⁴. The FSC was successor of the Shariat Benches

⁹ Article 198, *The constitution of Islamic Republic of Pakistan, 1956*

¹⁰“Council Of Islamic Ideology|||CII History”. 2019. *Cii.Gov.Pk*. Accessed January 22. <http://cii.gov.pk/aboutcii/History.aspx>.

¹¹ Article 204, *The Constitution of Islamic Republic of Pakistan, 1962*

¹²*Constitution of Pakistan 1973, Article 228*

¹³*Constitution of Pakistan 1962, Article 201*

¹⁴“Establishment – Federal Shariat Court Of Pakistan”. 2019. *federalshariatcourt.gov.pk*. Accessed January 24. <http://www.federalshariatcourt.gov.pk/en/establishment/>.

of the four High Courts of Pakistan established by the Constitution (Amendment) order 1979 (P.O No. 3 of 1979).¹⁵ After one year of these benches the FSC was established having its principle seat in Islamabad.¹⁶ The Chapter 3A of the Part VII of the constitution of Pakistan 1973 deal with the functions, jurisdiction rules number of judges of and appeals from the decisions of the FSC. According to the constitution the Federal Shariat Court has judges not more than eight including the Chief Justice of it. Among these judges not more than three judges can be from *Ulama* having experience of fifteen years in the research or engagement with Islamic law. Other five judges have to be selected from the persons who are or have been judges of a High Court.¹⁷ The tenure for the Chief Justice –or judges- of the FSC is three years but they can be selected for further periods of three years by the president of Pakistan.

As far as the functions of the Federal Shariat Court are concerned, the court has two basic functions. First the court has exclusive jurisdiction to decide whether or not any law or provision of law –enforced for the time being – is compatible with Islamic injunctions as prescribed by the *Qurān* and the *Sunnah* of the Prophet PBUH.¹⁸ The court can do so on the application of any citizen of Pakistan or Federal or Provincial Government or on its own motion.¹⁹ The other function of the FSC is that it hears the

¹⁵ There had been established Shariat Benches in all of the four High Courts of Pakistan i.e. Peshawar, Lahore, Sindh and Baluchistan High Courts. The Shariat petitions had been filed in Shariat Benches of Sindh, Lahore and Peshawar High Courts but only the Bench of Peshawar High Court reported its decision. The Bench of Lahore High Court decided only one petition but it did not report it. The FSC reported the decision on the appeal against the decision of the Lahore High Court Shariat Bench as BZ Kaikus vs Federal Government of Pakistan. See for details Martin Lau, *The Role of Islam in the Legal System of Pakistan* (Leiden/Boston: Martinus Nijhoff Publishers, 2006) 131

¹⁶Shahbaz Ahmad Cheema, "The Federal Shariat Court's Role to Determine the Scope of Injunctions of Islam and Its Implications." *Journal of Islamic State Practices in International Law*. 9:2 (2013): 92.

¹⁷*Constitution of Pakistan, 1973*, Article 203C (3A).The Chief Justice of Federal Shariat Court should be a person who is qualified to be –or has been- judge of the Supreme Court of Pakistan or who has been permanent judge of a High Court. See, article 203C (3) of the constitution.

¹⁸ The wording of the article 203G of the constitution suggests that if the matter comes under the original jurisdiction of the FSC i.e. the issue is related to the Islamicity of any law or legal provision, the jurisdiction in that matter belongs only to FSC and even Supreme Court of Pakistan will not have jurisdiction. See for details Muhammad Munir, *Precedent in Pakistani Law*, (Oxford University Press: 2014) 176

¹⁹ Article 203D, *Constitution of Pakistan, 1973*

appeals against the decisions of lower courts made in the matters related to Islamic Punishments i.e. *Hudūd*.²⁰

Giving the brief introduction of FSC, the rest about the court shall be discussed in the coming sections of the paper.

4. Role of CII

As it has been pointed out earlier, the fundamental role of CII is to check the compatibility of existing laws with the injunctions of Islam and to give recommendations to the legislature for future legislations. Apart from that the CII furnishes opinion in the matters referred to it by the President of Pakistan, the Governor of any province, any house of parliament and provincial assemblies.²¹

Fulfilling its constitutional obligation, the CII began reviewing the existing laws in Pakistan in 1974. The council submitted its first report in 1977 and it has submitted more than 90 reports so far. CII has reviewed thousands of law from the early 18th century to the present day. The CII has submitted its final report, after analyzing all the enforced laws from the beginning up to 1973, in 1996. It found about only 5 percent of the laws repugnant to the injunctions of Islam.²² Although the article 230 of the constitution of Pakistan requires the legislature to put the recommendations furnished by CII for discussion and make

²⁰ Ibid, Article 203DD.

²¹ According to the article 229 of the constitution the President and the Governors may refer to the council to know whether or not any proposed law is inconsistent with the injunctions of Islam. Further, the parliament and provincial assemblies are bound to refer to the council to seek advice about compatibility of proposed law with the injunctions of Islam if 2 fifth of the membership demands for that reference. In this situation, as provided by the article 230 of the constitution, the council shall inform, within fifteen days, the respective house of assembly about the period in which it would furnish its opinion. In this situation the President, Governor, assembly or the house of the parliament may not delay the legislation till the advice is furnished, if they consider making the law without delay is in the public interest. If the law is made before the opinion of the council and the council opines that the law is repugnant to the injunctions of Islam, the law shall be reconsidered. Article 230 of the constitution further requires the legislature to discuss the reports submitted by the council for legislation within six months from the day of submission and make laws in accordance with the recommendation of the council within two years.

²²Muhammad Khalid Masud, "Role of the Council of Islamic Ideology in the Islamisation of Laws in Pakistan." Paper presented at the Pakistan Summit: Disentangling the Politics of 'Crisis': The Pakistani State(s), Governance and Culture from Within, International Centre for Muslim and non-Muslim Understanding, Adelaide: University of South Australia (2015).

laws in accordance with the recommendations given by CII within two years, very few recommendations of the CII could attract the worthy attention of the legislature for consideration.²³

4.1. Why CII is Inefficient?

There are multiple factors why the Council of Islamic Ideology could not play an effective role in the Islamization of laws in Pakistan. In the following these factors are being elaborated.

- I. **Legal Factor:** The first and the foremost factor in the inefficiency of the CII is the legal framework. Despite having a significant mandate of reviewing laws with the perspective of Islamic injunctions, providing opinions for the proposed laws and recommendations for giving the Islamic injunctions legislative effects, the council of Islamic Ideology does not have a binding force.²⁴ Muhammad Munir points out that the nature of the recommendations given by the CII is that of non-binding recommendatory and the council does not have any independent power of enforcement.²⁵ This non-binding nature of the CII's opinions has been badly exploited by Pakistani legislature for not deliberating on the recommendations of CII.²⁶
- II. **Lack of Coherent Legal Theory:** The council of Islamic Ideology, as already has been pointed out, is entrusted to examine the laws on the touchstone of Islamic Injunctions as laid down in the *Qur'ān* and the *Sunnah*. Not following

²³ Ibid. According to Khalid Masud, who had been the Chairman of the CII from 2004 to 2010 only two of these recommendations, could reach to the parliament. Masud points out that had the legislature considered the recommendations of CII for legislation the objection on Pakistani law as being un-Islamic would have been removed as all of the existing laws from 1726 till today have been reviewed by the council and recommendation about the laws repugnant to Islamic injunction have been made. Nevertheless, Pakistani legislature rarely considered the recommendations of the council.

²⁴ Muhammad Izfal Mehmood, "Fatwa in Islamic law, institutional comparison of fatwa in Malaysia and Pakistan: The relevance of Malaysian fatwa model for legal system of Pakistan", *Arts and Social Sciences Journal* 6:3 (2015): 1-3.

²⁵ Muhammad Munir, "The Law of Khul' in Islamic Law and the Legal System of Pakistan", *LUMS Law Journal (LLJ)* 2 (2015): 33-63. The author identifies four basic principles of the legal theory of the CII. These principles are (a) the *al-ibāḥah al-aṣliyyah* -which means the presumption that everything is permissible unless proven otherwise by an evidence from the injunctions of Islam- (b) *qiyās* i.e. analogy, (c) *Istihsān* -which is giving preference to one analogy on the other but wrongly equated with equity of the common law- and (d) *maṣlaḥah al-mursalah*, which means the common interest.

²⁶ Khalid Masud pointed out the except for the three reports of his period as the chairman of the CII, the parliament did not officially put any report of the council for deliberations.

a particular school of Islamic law, the council was supposed to develop a coherent legal theory according to which it could extract laws from *Qur'ān* and the *Sunnah* in order to avoid the analytical inconsistency. The council however, instead of developing its own legal theory started picking opinions from different schools of Islamic law according to the needs of the situation.²⁷ This led the council to produce recommendations that are in conflict with each other.²⁸

- III. **Effects of the Change of the Chairman:** This factor is offshoot of the previous one. Not having a coherent legal theory of extracting laws from *Qur'ān* and the *Sunnah*, the recommendations of the CII are heavily influenced by the inclinations of its chairman. This has led the council to make conflicting recommendations. An interesting example of the impact of the change of the Chairman of the CII on its recommendation is divorce. The CII, under the chairmanship of Khalid Masud -who claims to be a progressive and reformist-, the council recommended that a husband should be made bound to give divorce to wife on her demand and if he does not comply with the demand of wife, the divorce should automatically be effective after 90 days of such demand.²⁹ In 2015, under the

²⁷Muhammad Mushtaq Ahmad, "Discovering the Law without a Coherent Legal Theory: The Case of the Council of Islamic Ideology.", *LUMS Law Journal (LLJ)* 4:1 (2017) 37-55

²⁸ There are a number of examples which show that the council has issued recommendations that are in conflict with the earlier recommendations of the CII. For instance, the CII issued recommendations concerning Hudood Ordinance 1979 in which the CII identified certain provisions of the Ordinance to be repugnant with the injunctions of Islam. The Hudood Ordinance 1979 were drafted and prepared by the CII itself. Other example is of the divorce. The council issued recommendations in 2008 that the husband should be made bound to give divorce on the demand of wife and the divorce should be effective after 90 days if the husband does not give divorce on the demand of wife provided that the wife does not revoke the demand. In 2015 the council issued recommendations that the courts should not issue the decree of *Khul'* without the consent of the husband.

²⁹ The recommendation reads as follows; "Therefore, in our opinion, a law should be enacted at the level of the state that, after a woman's written request for divorce, the husband must have an obligation to divorce her within 90 days. If the husband refuses to divorce her, the marriage shall stand dissolved after the passage of this time [90 days] except if the wife revokes her request. The husband should have no right to revoke after this. The wife must return assets and property given to her by the husband except dower and maintenance if demanded by the husband or else approach a court of law for the resolution of the conflict (of return of assets/valuables)." See, Council of Islamic Ideology, *Annual Report, 2008-9* (Islamabad: Council of Islamic Ideology, 2009) 170, available at: <http://cii.gov.pk/E-Books.aspx>

chairmanship of Maulana Muhammad Khan Shirani –who is deemed to be a conservative ‘*ālim-*, the council gave an opposite opinion that the courts should not dissolve the marriage on the basis of *khul’* without the consent of the husband.³⁰In the last year under the chairmanship of Qibla Ayaz, yet again the issue of divorce surfaced on the media when the council proposed that a new *Nikahnama* would be introduced by which the husband would be bound to divorce the wife on her demand.³¹

IV. **Controversies:** Another factor which leaves a bad impact on the role of CII and damages its credibility before the people of Pakistan is that the CII has made a number of recommendations which infuriated either the moderate or the religious class of population. Some instances of these controversies are as follows.

A. In 2005 the CII reviewed “The Offence of Zina (Enforcement of Hudood) Ordinance, 1979” –which was drafted by the very CII back in 1979– and proposed certain amendment, which later resulted in the Protection of Women (Criminal Laws Amendment) Act, 2006. This proposal was vigorously opposed by religious groups. Surrendering to the intensity of the opposition, some ministers proposed that a group of *Ulama* should examine the proposal given by CII based on which the *Hudūd* laws had to be amended. The members of the council decided that they will resign from the office if the proposal is put before the *Ulama* to examine as the council was the only constitutional body to examine the Islamicity of laws.³²One of the members of CII, Javed Ahmad Ghamidi announced his resignation from CII but his resignation could not be completed.³³

B. In 2009 the CII made the recommendation that a divorce should be effective after 90 days if the wife

³⁰ The same was the recommendation by the council in the Annual report, 2014-15. See, Council of Islamic Ideology, *Annual Report, 2014-15* (Islamabad: Council of Islamic Ideology, 2015) 114, available at: <http://cii.gov.pk/E-Books.aspxlast accessed January 26, 2019>.

³¹ The Express Tribune, “CII drafting new comprehensive nikahnama” *The Express Tribune*, 2018, (<https://tribune.com.pk/story/1826664/1-cii-drafting-new-comprehensive-nikahnama/> last accessed Feb 3, 2019).

³² Khalid Masud, the Role of Council of Islamic Ideology

³³ Urdu Point, "اسلامی نظریاتی کونسل کے رکن جاوید غامدی نے اعلان کے باوجود ابھی تک اپنا استعفیٰ " *Urdu point*, November 2006, (<https://www.urdupoint.com/pakistan/news/islamabad/important-news/live-news-11324.html> last accessed February 3, 2019).

demands from the husband and he refuses to pronounce the same. This prompted a widespread criticism on the CII by various religious groups. Khalid Masud, the then chairman of the CII attempts to justify the recommendation on the notion of legal reformism and his criticism *ontaqlid*. It is widely used presumption that Pakistan does not follow a particular school of Islamic law, hence the CII –and FSC for that matter – are not bound by the opinions and interpretations of Muslim jurists. This is true but it is not understandable how CII violates all of the schools of Islamic law and comes up with a recommendation which does not comply with any Islamic School. Muslims of Pakistan follow one or other school and coming up with a recommendation inconsistent with all schools is interfering in the personal law of Muslims: a jurisdiction which even the FSC does not have.³⁴

- C. In 2016, Maulana Muhammad Khan Shirani, the then chairman of the CII, in a press briefing stated that the husbands should be allowed to slightly beat their wives and that should not be considered as violence. This statement prompted an outrage among people particularly the secular groups.³⁵ At this time the very existence of CII was questioned by a member of upper house. Farhat Ullah Babar, the senator from PPP (a political party in Pakistan) argued that the function of the CII was to review the existing laws in order to bring them in conformity with the injunctions of Islam and with the submission of the final report in 1996, the CII has completed his function and now there is no need of the existence of CII. He further argued that the FSC can nullify the laws on the touchstone of Islamic injunctions thus, there is no need of the CII and it should be dissolved.³⁶

5. Role and Functions of FSC

³⁴ See the discussion on the jurisdiction of the FSC below.

³⁵ The Express Tribune, "Gentle Beating' Of Wife Is No Violence, Says CII Chief" *The Express Tribune*, 2016(<https://tribune.com.pk/story/1111222/nothing-serious-gentle-beating-wife-no-violence-says-cii-chief/> last accessed February 3, 2019).

³⁶ Wasim, Amir, "Senators Question Existence Of Council Of Islamic Ideology". *DAWN.COM*, 2016([https://www.dawn.com/news/1232659last accessed February 3, 2019](https://www.dawn.com/news/1232659last_accessed_February_3_2019)).

The Federal Shariat Court has three types of jurisdictions i.e. original exclusive, review and revisional.³⁷

In the first one, the FSC has the authority to examine any law in Pakistan whether or not the law is repugnant with the injunctions of Islam. FCS can do so on its own motion, on the reference of the federal or provincial government and on the petition filed by any citizen of Pakistan. If the court finds any law repugnant to the injunctions of Islam, the court informs the legislature –the parliament in case of the matter is in Federal Legislative List and respective provincial assembly if the law is made by the province – about the repugnancy of the law with the injunctions of Islam. The court, in doing so first of all gives the reasons why the law or the provision of law is repugnant to the Islamic injunctions and secondly it specifies the extent to which the law is repugnant to the injunctions of Islam. Further, the court specifies the time by which the law has to be amended. An appeal can be filed against the decision of FSC in SAB of the SCP within specified period.³⁸ If the decision of FSC is not challenged or the decision is sustained by the SAB, the repugnant law would be ineffective on the day on which the decision of FSC becomes effective.

In the second one, the FSC can review any decision made by the FSC itself. This jurisdiction has been conferred to the FSC under Article 203-E (9) of the constitution.

In the third jurisdiction the FSC has the power to examine the decision made by the lower courts in the matter related to the enforcement of *Hudūd*. For this purpose, the FSC can call for the record of the lower court and may order to suspend the execution of sentence and to release the accused on bail. In this regard, the FSC has the power to enhance the punishment awarded by the lower court if the court deems fit. However, the FSC does not have the authority to convert an acquittal of the trial court into conviction.³⁹ Apart from that, the FSC also entertains the appeal from the decision of trial courts in the matters of *Hudūd*. Further, the FSC has the jurisdiction to punish the offenders of the contempt of court.

³⁷Faqir Hussain, *The judicial system of Pakistan* (Islamabad: Supreme Court of Pakistan, 2011) 24

³⁸ This period is sixty days if the aggrieved person is a citizen of Pakistan. If the appeal is being made on behalf of the Federation of Pakistan or any Province of it, this period is six months. See, Constitution of Pakistan 1973, article 203-F

³⁹ Ibid. Article 203-DD (2).

Giving this brief account of the role of the FSC in the Islamization of laws in Pakistan, in the next part we will discuss the reasons why this court has become a toothless institution and why it could not play an effective role in the process of Islamization of laws.

5.1. Why FSC is a less effective institution?

There are multiple reasons why the Federal Shariat Court could not play an effective role in the realization of the dream of Islamization of laws in Pakistan. These factors are as follows;

- I. **Jurisdiction of the Court:** The first and foremost factor which prevents the FSC from playing an efficient role is its lack of jurisdiction in various areas of law. According to the article 203-B of the constitution⁴⁰ the FSC does not have jurisdiction to examine the Islamicity of any article of the constitution⁴¹ any provision of Muslim personal law and procedural laws. Furthermore, for a period of ten years the FSC would not have jurisdiction on the issues related to taxation and fiscal laws. Keeping in view the plain wording of the constitution the FSC restrained itself from asserting jurisdiction on the matters related to codified family law of Pakistan.⁴² Even the SAB of the SCP overturned the decision of Shariat Bench of the Peshawar

⁴⁰ The article reads as follows; "law" includes any custom or usage having the force of law but does not include the Constitution, Muslim personal law, any law relating to the procedure of any court or tribunal or, until the expiration of [ten] years from the commencement of this Chapter, any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure".

⁴¹ According to the existing scheme of jurisdiction there is a deadlock when it comes to decide the Islamicity of a constitutional provision. As it has been noted, the FSC does not have jurisdiction on the constitution while FSC is the only court which can decide the Islamicity of law. Thus, if any provision of constitution is challenged on the ground of Islamicity, the FSC does not have jurisdiction and no other court, including the Supreme Court of Pakistan, can decide Islamicity of laws. This is provided in the article 302 G of the constitution and it was held by the Supreme Court of Pakistan in *Zahid Rehman v The State* PLD 2015 SC 77 in which Justice Asif Saeed Khosa noted that "[I]t must never be lost sight of that by virtue of the provisions of Article 203 G of the Constitution of the Islamic Republic of Pakistan, 1973 this Court or even a High Court, has no jurisdiction to test repugnancy or contrariety of any existing law or legal provision to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah and such jurisdiction vests exclusively in the Federal Shariat Court and the Shariat Appellate Bench of this Court." This leads to a deadlock where the matter of the Islamicity of constitutional provision cannot be resolved.

⁴² Elisa Giunchi, *Adjudicating Family Law in Muslim Courts* (New York: Routledge, 2014) 16

High Court on the ground that the said bench did not have jurisdiction on MFLO for the reason of being Muslim personal law.⁴³ In the later years, however, the FSC asserted its jurisdiction on the codified Muslim family laws of Pakistan on the ground that these laws does not fall within the meaning of Muslim Personal Law. The Supreme Court of Pakistan also held in *Mahmood ur Rahman vs Government of Pakistan* that the codified statutes are under the jurisdiction of FSC.⁴⁴ The FSC also asserted its jurisdiction on MFLO in *Allah Rakha vs Federation of Pakistan*.⁴⁵ As far as the constitution of Pakistan is concerned the FSC has been inconsistent about its jurisdiction in it. In *B.Z Kaikus vs President of Pakistan*, the FSC held that Representatives of People Act 1976 is related to the constitution thus, is beyond the jurisdiction of the court.⁴⁶ But in *Muhammad Salah ud Din vs Government of Pakistan* the FSC held that the same act is not related to constitution and thus, it comes under the jurisdiction of the FSC.⁴⁷ Due to this inconsistent behavior of FSC about its jurisdiction, where the court avoided controversial decisions exploiting its jurisdictional limitations and extended its jurisdiction where it felt flexibility, the FSC has been criticized.⁴⁸ Apart from that the jurisdiction of the FSC has been further curtailed by the enactment of the Women Protection Act 2006 in which it has been enacted that the appeals against certain cases of Hudood Ordinance, 1979 are excluded from the jurisdiction of FSC and transferred to the High Courts.⁴⁹

- II. **Tenure of Judges:** Another factor which makes the FSC susceptible to the influence of powerful executive is the tenure of the judges of FSC. According to the article 203-C (4) of the constitution of Pakistan the judge of the FSC cannot hold his office for a period longer than three years. However, he can be selected for further such periods by the president of Pakistan. This places the judges in a weaker position where they can be manipulated by the executive for the greed of the extension of their tenure,

⁴³*The Federation of Pakistan vs Mst. Farishta*, PLD 1981 SC 120.

⁴⁴ PLD 1994 SC 607

⁴⁵ PLD 2000 FSC 1

⁴⁶ PLD 1981 FSC 1

⁴⁷ PLD 1990 FSC 1

⁴⁸Daniel P Collins, "Islamization of Pakistani Law: A Historical Perspective.", *Stanford Journal of International Law*. 24 (1987) 511.

⁴⁹ Faqir Hussain, *Judicial System of Pakistan*, 14

which is against the well settled principle of the independence of judiciary.⁵⁰

- III. **Appeals Against the Decisions of FSC:** Another factor which exhausts the efforts of the FSC is the appealing system. According to the constitution of Pakistan an appeal can be made against the decision of FSC in the SAB. The SAB is composed of 3 judges of the SCP and not more than 2 *Ulama* who can be appointed to attend the proceedings as *ad hoc* judges of the SCP. The problem with this system is that there is no time frame given for the constitution of the Appellate Bench. This is the reason the decisions of the FSC are pending in the Shariat Appellate Bench for more than decades.⁵¹ The FSC in a *suo motodecision* declared that the section 10 of the Citizenship Act of Pakistan 1951⁵² is repugnant to the Islamic injunctions and article 25 of constitution of Pakistan.⁵³ The Government of Pakistan challenged the decision in the SAB and the matter is pending in the court.

6. Conclusions

⁵⁰ Ibid.

⁵¹ Almost every decision of the FSC is challenged by the government and it goes in the status of hibernation for an indefinite period. There are numerous examples of such cases. Allah Rakha Case was decided in 2000 by the FSC and the government Pakistan challenged the decision in the SAB and after 19 years the case is pending in SAB. The issue of Riba is another example of delaying tactics by the government. The FSC in *Mahmood-ur-Rahman Faisal v. Secretary, Ministry of Law* PLD 1992 FSC 1, declared Riba repugnant to the Quran and Sunnah and the government of Pakistan preferred an appeal against the said decision in the SAB. The SAB upheld the decision of FSC in 1999 and directed the government of Pakistan to amend the banking laws within two years. The government filed a review petition in the SAB which sent the case back to FSC directing the court to reconsider its decision by taking advice from the contemporary Muslim scholars. See, Muhammad Munir. "Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan." *Islamic Studies* (2008): 445-482. The FSC started hearing the case after 15 years in 2017 see, The Express Tribune, "FSC Agrees To First Define 'Riba'", *The Express Tribune*, 2017 (<https://tribune.com.pk/story/1354567/25-years-fsc-agrees-first-define-riba/>) last accessed February 5, 2019).

⁵² The said article says that a foreigner male spouse of a Pakistani woman is not eligible to apply for Pakistani citizenship on the ground of his marriage with a Pakistani woman. While a foreigner woman can apply for Pakistani citizenship on the ground of her marriage with a Pakistani man.

⁵³ FSC (2006) 1/K

Pakistan recognizes Islam as the state religion. According to the constitution of Pakistan all laws are supposed to be compatible with Islamic injunctions and no law should be in violation of these injunctions. In order to fulfill this promise there are two constitutional institutions i.e. the CII and the FSC. The former is entrusted to review the existing law to examine whether or not these are in conformity with the injunctions of Islam and check the compatibility of proposed laws with the injunctions of Islam and make recommendations for proposed laws. However, these recommendations are not binding in nature and the institution does not have any binding force to enforce the recommendations. The latter has the authority to examine the laws and declare any law null and void on the ground of being inconsistent with the injunctions of Islam. Despite having these institutions and strong desires of the majority of Pakistani people the dream of Islamization could not be realized. This is because these two institutions either could not play their effective role in the Islamization of laws in Pakistan or these are made toothless institutions. Thus, there is need of structural change in the role and functions of these institutions so that the aspirations of an Islamic Republic of Pakistan could be realized in true letter and spirit.

7. Recommendations

Based on what has been analyzed and concluded the author makes the following humble recommendations.

- I. The parliament and the Provincial Assemblies –as the case may be – should be made under obligation to at least consider the recommendations of the Council of Islamic Ideology. Further, these legislative bodies should give reasons if they are of the opinion that legislation cannot be made on the recommendations given by the CII.
- II. The CII should be made under obligation to adopt a coherent framework for extracting laws from the texts of *Qur'ān* and the *Sunnah*.
- III. The CII, particularly the appointment of its chairman, should be free of political considerations and ideology of ruling regimes.
- IV. The jurisdiction of Federal Shariat Court should not be limited. It should have the authority to examine Islamicity of any law.
- V. There should be an age of retirement for the judges of the FSC and their tenure in the office should be assigned with the age of retirement and not three years. If the tenure

must be three years, then there should be no appointment for further tenure so that the judges of FSC may not have any expectations of extension of tenure and work free from greed of the power.

- VI. There must be a time frame for the appeals against the decision of FSC so that the decisions of FSC should not go infertile and they become fruitful. The appeals against the decisions of FSC should be decided within a period of 5 years from the date of the decision of FSC. Should the SAB remand the matter back to FSC, the decision of FSC should be final and unchallengeable.

هذا ما عندي والعلم عند الله

